

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 194, FOOD AND DRUGS ACT.

ADULTERATION AND MISBRANDING OF LEMON EXTRACT.

In accordance with the provisions of section 4 of the Food and Drugs Act of June 30, 1906, and of regulation 6 of the rules and regulations for the enforcement of the act, notice is given of the judgment of the court in the case of the United States against the Edward Westen Tea & Spice Company for violations of section 2 of the aforesaid act, lately pending in the District Court of the United States for the Eastern District of Missouri.

On October 31, 1907, an inspector of the Department of Agriculture purchased from B. C. Twenhofel, Kansas City, Kans., a sample of a food product labeled "Superior Quality Wyandotte Pure Lemon Flavor for flavoring ice cream, pastry, etc. Put up for B. C. Twenhofel, Kansas City, Kans." This sample was analyzed in the Bureau of Chemistry of the United States Department of Agriculture and was found to contain not more than two-tenths of 1 per cent, if any, of lemon oil and no citral.

On August 22, 1907, an inspector of the Department of Agriculture purchased from M. M. Smith, Holdenville, Ind. T., a sample of a food product labeled "Puritan Brand Flavor of Lemon for flavoring Ice Cream, Pastry, etc. Edw. Westen Tea and Spice Co. St. Louis." This sample was analyzed in the Bureau of Chemistry of the United States Department of Agriculture and found to be a liquid containing no lemon oil and only a trace of citral.

From the aforesaid analyses it appeared that the articles were adulterated within the meaning of section 7 of the act in that a solution containing but two-tenths of 1 per cent of oil of lemon, in one case, and a highly dilute solution of citral, containing no oil of lemon, in the other, had been substituted for the genuine articles; and were mis-

branded within the meaning of section 8 of the act in that they were labeled "Superior Quality Wyandotte Pure Lemon Flavor," in the one case, and "Puritan Brand Flavor of Lemon," in the other, which statements were false and misleading in that the products were not lemon flavor, but a dilute solution containing two-tenths of 1 per cent of oil of lemon and a dilute solution of citral, respectively.

It appearing from the aforesaid analyses that the articles were adulterated and misbranded, the Secretary of Agriculture gave notice to B. C. Twenhofel, Kansas City, Kans., and M. M. Smith, Holdenville, Ind. T., the dealers from whom the samples were purchased, and to the Edward Westen Tea & Spice Company, St. Louis, Mo., the manufacturer and shipper, and gave them an opportunity to be heard. The Edward Westen Tea & Spice Company being the party solely responsible for the adulteration and misbranding of the articles and failing to show any fault or error in the results of the aforesaid analyses, and it being determined that the articles were adulterated and misbranded, on June 20, 1908, and December 4, 1908, respectively, the said Secretary reported the facts and evidence to the Attorney General, by whom they were referred to the United States Attorney for the Eastern District of Missouri, who filed informations against the Edward Westen Tea & Spice Company. The cases having duly come on for hearing on the facts as alleged in the informations and the defendant's pleas of not guilty, and a jury having been demanded by the defendant, the issue was submitted to a jury upon the testimony, argument of counsel, and the following instructions of the court:

ST. LOUIS, *November 30, 1909.*

UNITED STATES OF AMERICA	}
<i>vs.</i>	
EDWARD WESTEN TEA & SPICE COMPANY.	

CHARGE OF JUDGE DYER.

GENTLEMEN OF THE JURY:

The Act of Congress under which these informations have been filed, went into effect on the 1st day of January, 1907. It is, therefore, quite a recent statute.

The States in their separate capacities, may have undertaken to regulate the sale of food products, but until this Act was passed Congress had taken no effective action to prevent the adulteration and misbranding of articles of drugs, food, etc.

Here we have only to deal with Congressional acts.

The Court has nothing to do with State statutes applying to the same thing. This court gets jurisdiction only by virtue of an Act of Congress conferring upon the court the jurisdiction to try such offenses as these.

Congress has the power to legislate for the Territories, including the District of Columbia. The laws passed by Congress with reference to the manufacture and sale of articles in the Territories and the District of Columbia, is exclusively with Congress.

Under the Interstate Commerce laws, Congress has undertaken to say what shall and what shall not be proper shipments in interstate commerce between States. It has undertaken to say in the Act to which I have referred, what is an adulteration

and what is a misbranding of articles manufactured and sent to other places within the State proper. Under the Constitution Congress had full and complete authority to do that.

The first section of this Act refers to the District of Columbia and the Territories.

The second section prohibits the sending in interstate commerce, from one State to another, articles of food that are adulterated or articles of food that are misbranded, and they have announced a penalty in the statute against those things.

In view of what has been said by counsel in reference to this recent Act of Congress, it will probably not be unprofitable for the Court to say something in reference to the matter.

The second section of the statute, to which I call your attention, provides:

“That the introduction in any state or territory, or the District of Columbia, from any other State or Territory, or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited. And any person who shall ship, or deliver for shipment, from any state or territory or the District of Columbia, or to any other state or territory, or the District of Columbia, or to a foreign country; or who shall receive in any state or territory or the District of Columbia, from any other state or territory or the District of Columbia, or foreign country, and having so received shall deliver in original, unbroken packages, for pay or otherwise, or offer to deliver to any other person any such article so adulterated or misbranded, within the meaning of this act; or any person who shall sell or offer for sale in the District of Columbia or the territories of the United States any such adulterated or misbranded foods or drugs; or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor and for such offense be fined not exceeding two hundred dollars (\$200.) for the first offense; and upon conviction, for each subsequent offense not exceeding three hundred dollars (\$300.), or by imprisonment not exceeding one year, or both, in the discretion of the court.”

So as to acquaint you, as the court has tried to acquaint himself, with the modus operandi provided by this statute for finding out and ascertaining whether or not this law has been violated, the third section provides that the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor, shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examinations of specimens of food and drugs manufactured or offered for sale in the District of Columbia, or any of the Territories of the United States; or which shall be received from any foreign country, or intended for shipment to any foreign country; or which shall be submitted for examination, or at any domestic or foreign port through which said product is offered for interstate commerce.

There is the authority conferred upon these members of the different Departments, to make regulations for the gathering of testimony or evidence, so to speak, of any violation of these laws. Then it was provided, and was read here in the stipulation:

“That the examination of specimens of food and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, under the direction and supervision of said Bureau, for the purpose of determining from such examination whether such articles are adulterated or misbranded, within the meaning of this act.”

You will see by the testimony in this case, that in each of these cases a Government officer went to the place of business of the parties named and bought from them the bottles containing this mixture, and he sent them to the laboratory—one to the Boston and the other to the Chicago laboratory, all passed upon by the Government authorities and by them found to be adulterated.

Then what follows? The Government does not put a defendant to trial because of that inquiry alone, but it goes further and says: if that be found to be so from the examinations made of this product (and you will remember that the officers of the Government, who bought these articles, testified here that they sent two bottles to one place, two bottles to another place, and the remaining two bottles were left with the person from whom they were taken), as shown in those bottles, that they had been adulterated, and that they had been misbranded, then they were required to go further, after that was ascertained.

“Finding that they were adulterated or misbranded, within the meaning of the Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such samples were obtained.”

So this defendant was notified by the Secretary of Agriculture that these articles had been bought and that they had been found to be adulterated; but before authorizing any action to be taken by the District Attorney, a hearing was had, at which the defendant was authorized to appear; and after that hearing (the Department being still satisfied, from the hearing, that the articles had been adulterated or misbranded), it became the duty of the Secretary under this Act of Congress, to transmit to the District Attorney instructions to begin the proceedings, together with a copy of the analysis made at the time of the examination.

From the evidence in these cases, and from the stipulation filed, it appears all of that was done, and these proceedings commenced. This Act provides that:

“For the purpose of this Act an article shall be deemed to be adulterated in case of food, first, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength; second, if any substance has been substituted wholly or in part for the article; third, if any valuable constituent of the article has been wholly or in part abstracted; fourth, if mixed, colored or powdered in a manner whereby damage or inferiority is concealed.”

That is in reference to the article itself. Then in the same article, Section 8, it says:

“That the term ‘misbranded’ as used herein shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such articles or the ingredient or substance contained therein, which shall be false or misleading in any particular and to any food or drug product which is falsely branded, of such territory or country in which it is manufactured or produced.”

So you will see what the purpose of Congress was, that no one who is desirous of knowing what the law is in that regard may make any mistake about it. The law requires the manufacturer to be honest in his statement of the contents of the package; it requires him to be honest in stating the truth upon the labels put upon it. That is all there is to the act. That is what the act is intended to accomplish, and which, if properly enforced, in my judgment, will accomplish.

It is the duty of you and of this court to obey the law and to enforce it; to enforce this statute as you would enforce every other statute. But it is not out of place for me to say here, that in the judgment of the court, no act of congress has been passed in recent years of more importance than this one.

In dealing in food stuffs, the seller should, and ought to know, what he is selling, and, on the other hand, the buyer should know what he is buying.

This statute is not to be evaded by a mere subterfuge. It is to be enforced according to its letter and its spirit, and when that is done no one suffers by it.

Now I have said that much in reference to this statute because, as it has been said, it is a recent statute and it may be proper that the statute should be given a fair interpretation, and I repeat that the statute is so plain as to the purpose and intent of congress that there is no excuse for its violation.

There were three separate informations filed against this defendant in this court. They are numbered respectively 5394, 5427 and 5400. You are to consider only the two, 5427 and 5394. 5400, as I will direct you, is not supported by the testimony in this case, because the witness that was here from Oklahoma was not sufficiently able to state with positiveness that the article that the inspector found in his store was in the shipment made in 1907 or in 1906; and upon that information (the only count of which is for misbranding), you will be directed to find a verdict of not guilty. Let us see what, in effect, the remaining two are:

If they had been filed at the same time it would have been perfectly proper for the United States Attorney to have included in one information each of the counts that are embraced in these two; but they were filed at different times, and hence, when the cases were called they were consolidated for the purpose of trial. There is no question about the shipments; no question about them having been sent from here to the places mentioned; that is all supported and agreed upon. This first count, No. 5427, charges that shipment was made by this defendant from the City of St. Louis, of articles for sale in interstate commerce "then and there labeled 'Puritan Brand Flavor of Lemon for flavoring ice cream, pastry, etc. Edw. Westen Tea & Spice Co. of St. Louis' (band around the neck labeled 'Strictly Pure')", which bottle was part of a larger consignment consisting of one box of bottled extracts shipped by Westen & Company, from St. Louis, to M. M. Smith, Holdenville, Indian Territory; that the contents of said bottle were adulterated, in violation of the act of congress of June 30th, 1906; that said bottle contained a liquid which was not flavor of lemon; that true and genuine flavor of lemon, or lemon extract, is a solution of not less than 5 per cent by volume of oil of lemon in grain alcohol; and that the liquid contained in said bottle contained no oil of lemon; that another substance, to-wit: a highly diluted alcoholic solution of citral had been substituted wholly for the article, all of which was to the defendant well known."

That is the first charge in the first count of this information, and the second count charges that the article was misbranded. You have in the first count the allegation and charge that this was an adulteration within the meaning of the statute. The second count charges that it was misbranded.

The other information charges substantially the same thing, only that it was shipped to a different person, in Kansas, instead of the Indian Territory, and the charge in the first count of this information is as to the same articles—"That the contents of said bottle were adulterated in violation of the act of congress of June 30th, 1906, in this, that the said bottle contained a liquid which was not pure lemon flavor; that true and genuine lemon flavor, or lemon extract, is a solution of not less than five per cent (5%) by volume of oil of lemon in grain alcohol and that the liquid contained in said bottle contained about two-tenths of one per cent by volume of oil of lemon, and that another substance, to-wit: a two-tenths of one per cent solution of oil of lemon has been substituted wholly for the article and that other substances had been mixed and packed with the liquid contained in said bottle, so as to reduce and lower and injuriously affect its quality and strength."

That is the first count of that. The second count is for misbranding, charging that this article so sent was misbranded by calling it a "Superior Quality of Wyandotte Pure Lemon Flavor for flavoring ice cream, pastry," etc.

These are the four counts with which you have to deal. A great deal of testimony has been offered here as to whether the words "lemon extract" and "lemon flavor" are used in the trade as synonymous terms. It is not my purpose to comment upon that testimony, although I have a right to do so. I prefer not to do so. I propose to submit these questions to you as business men and as intelligent men, able to judge well as the court, the value of the testimony that has been given here before you. It is for you to determine from the evidence whether or not the terms "lemon flavor" and "lemon extract" are synonymous and mean one and the same thing.

The contention of the Government is that "lemon extract" and "lemon flavor" both mean the same article, while the defendant contends that they do not. It is for you to determine whether by "lemon extract" and by "lemon flavor" is meant the same thing in the business world—in the trade, and whether or not the brand upon this bottle of "lemon flavor" would indicate to the purchaser that it was an article like or equivalent to "lemon extract."

This statute imposes a penalty for its violation and to that extent is what we call a criminal proceeding against this defendant. In this case, as in all cases of a criminal character, the defendant is entitled to the benefit of any reasonable doubt arising in the minds of the jurors touching the inquiry that they have in hand. By a reasonable doubt is meant not a mere suspicion, but a doubt, arising from the evidence in the case, that would lead you to have a doubt as to whether or not the party is guilty of the offense as charged, and I may give in that connection an instruction that is asked by the defendant, to-wit:

"The court instructs the jury that it is the duty of the government to satisfy them beyond a reasonable doubt, of all the facts necessary to convict the defendant, on each and every count, of each and every information; and if, in respect to any of said counts the jury entertain a reasonable doubt, it will be their duty on such count to return a verdict in favor of the defendant."

"The court does not mean, however, that such doubt may be a mere suspicion of doubt or a mere conjecture, but if the evidence fairly leaves the jury in a state of uncertainty as to the guilt of the defendant on any of the counts, they should return a verdict thereon of not guilty."

You have heard the testimony of various witnesses as to what the rule was that obtained prior to the passage of the Pure Food Law. Some witnesses have said that before the passage of that act there was no difference, to the trade, between the words "extract" and "flavor"—that they were used synonymously; that since the Pure Food Act was passed there has arisen some question as to whether a diluted extract of lemon may be considered a flavor—whether a per cent less than five would still make a lemon flavor. All of these matters I submit to you. You have seen the witnesses on the stand and you have observed their manner and demeanor. If you think any one has sworn falsely, you are at liberty to discredit the entire testimony of such a witness.

The Marshal will have a form of formal verdict prepared by the Clerk, for your consideration. I may also say, and I should have said at the time, that the hearing had before the Secretary of Agriculture, or before the officer of the Department of Agriculture as to whether there was any adulteration of this product, or misbranding, is not to be considered as any evidence whatever against this defendant. I have only mentioned the law as providing certain things to be done, and certain things that the Secretary must do, after he in his own mind is satisfied, but none of those things has any binding effect upon you or the defendant here in this trial. I may also say that no regulation (if there be such a regulation) made by any officer of the Government, is binding upon the defendant. You are to determine this case from the facts as charged in the information, as to what was understood in the trade and commerce of the meaning of these two terms.

On November 30, 1909, the jury having returned a verdict of guilty, the court imposed upon the defendant a fine of \$50 on each count, amounting in all to \$200.

JAMES WILSON,
Secretary of Agriculture.

WASHINGTON, D. C., *February 12, 1910.*